STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DERRICK C. O'KEEFE, Charging Party, v. INLANDBOATMEN'S UNION OF THE PACIFIC, Respondent.	Case No. SF-CO-228-M PERB Decision No. 2199-M August 29, 2011

Appearance: Derrick C. O'Keefe, on his own behalf.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Derrick C. O'Keefe (O'Keefe) of a Board agent's dismissal (attached) of O'Keefe's unfair practice charge. The charge alleges that the Inlandboatmen's Union of the Pacific (IBU) violated the Meyers-Milias-Brown Act (MMBA)[1] by retaliating against O'Keefe for having filed prior unfair practice charges with PERB against IBU and the employer, Golden Gate Bridge Highway and Transportation District (District), and for having assisted a co-worker, Willard Park, with his PERB charge against the District. The charge alleges that this conduct violated MMBA sections 3502, 3502.1 and 3506, and PERB

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Regulation 32603.[2] The Board agent dismissed the charge, finding that it failed to state a prima facie case.

The Board has reviewed O'Keefe's appeal, the warning and dismissal letters and the entire record in light of the relevant law. Based on this review, we find the Board agent's warning and dismissal letters to be well-reasoned, free of prejudicial error and in accordance with applicable law. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CO-228-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

[2] In addition, the charge alleges violations of PERB Regulations 99563.8(B) and 99563, which do not exist. (PERB regs. are codified at Cal. Code Regs., title 8, sec. 31001 et seq.) These appear to be sections of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (codified at sec. 99560 et seq.), a statutory scheme not applicable here.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8387
Fax: (916) 327-6377

July 15, 2010

Derrick O'Keefe

Re: *Derrick C. O'Keefe v. Inlandboatmen's Union of the Pacific*
Unfair Practice Charge No. SF-CO-228-M
DISMISSAL LETTER

Dear Mr. O'Keefe:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 25, 2010. Derrick C. O'Keefe (O'Keefe or Charging Party) alleges that the Inlandboatmen's Union of the Pacific (IBU, Union or Respondent) violated sections 3502, 3502.1 and 3506 of the Meyers-Milias-Brown Act (MMBA or Act)[1] and PERB Regulation 32603 by retaliating against him for filing earlier charges with PERB and for filing a grievance in December 2009 against his employer, Golden Gate Bridge Highway and Transportation District (District).[2]

Charging Party was informed in the attached Warning Letter dated June 29, 2010, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to July 12, 2010, the charge would be dismissed.

On July 14, 2010 PERB received an amended charge postmarked on July 12, 2010. In the Warning Letter, I pointed out problems with Mr. O'Keefe's theory that IBU had retaliated against him on January 12, 2010 when IBU's Executive Committee voted not to pursue his December 21, 2009 grievance and voted to send Mr. O'Keefe a letter of reprimand for his addressing Ms. Secchitano as Mrs. Secchitano. In the First Amended Charge Mr. O'Keefe states:

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

[2] In addition the charge alleges violations of Regulations 99563.8(B) and 99563, which are not PERB Regulations and therefore, will not be addressed here. PERB has repeatedly held that it has no jurisdiction to enforce rights contained in other statutes such as the Education Code. (*Barstow Unified School District* (1997) PERB Decision No 1138b.) These allegations were not explained in the First Amended Charge.

> Apparently, I was not clear enough in the Unfair Practice Charge against the InlandBoatman's Union (IBU) Regional Director Marina Secchitano. The Due Process, Manufactured Discipline, Verbal Abuse and Denied Medical Access that I Suffered at the hands of Golden Gate Bridge Highway and Transportation District(GGBHTD)/Golden Gate Ferry(GGF) was "manufactured and orchestrated by the IBU Regional Director Marina Secchitano" and a direct result of my PERB and Willard Parks [sic] Trails [sic], both IBU Marina Secchitano Sexual Harassment Trail [sic] March 2010 and IBU Executive Committee Member Sandy Ailes Sexual Harassment PERB Trail [sic] November 2009.

Mr. O'Keefe then addresses omissions or errors in the response to the charge by IBU's counsel, Mr. Iglitzin. At no point does Mr. O'Keefe discuss the deficiencies I address in the Warning Letter. The assertion that IBU acted "outside the realm of normal union behavior" when it issued him a letter of reprimand for addressing the regional Director as Mrs., rather than Ms., does not overcome the flaw in the charge that a letter of reprimand from IBU does not establish an adverse action. In *Service Employees International Union Local 1000 (Hernandez)* (2009) PERB Decision No. 2049-S, the Board held that it will not intervene in disputes that involve only the internal union activities of an employee organization, unless those activities substantially impact employer-employee relations. Therefore, the allegations related to the January 12, 2010 actions taken by IBU are hereby dismissed based on the facts and reasons set forth in the June 29, 2010 Warning Letter.

There were no facts provided relating IBU to the denial of medical access, therefore that allegation is dismissed.

The original charge did not provide any information related to Mr. Park's hearing or the allegations related to his termination. In the First Amended Charge, Mr. O'Keefe attempts to link Mr. Park's termination from employment, allegedly for posting bulletins casting a co-worker in a negative light, and O'Keefe's being interviewed and shouted at and threatened by District Deputy General Manager, James Swindler on January 12, 2010 for the same reasons. (Subject matter of Unfair Practice Charge No. SF-CE-747-M.)

Mr. O'Keefe believes that IBU's Regional Director forwarded Swindler a copy of Mr. Park's e-mail which allegedly defames a co-worker. Copies of the e-mails were shown to Mr. O'Keefe when he was questioned on January 12, 2010 by Mr. Swindler. Mr. O'Keefe believes that Ms. Secchitano set up Mr. Park and was trying to set him up by providing Mr. Swindler with internal IBU e-mail copies. Attached to the charge are a series of exhibits which fail to establish that Ms. Secchitano was responsible for forwarding e-mails to Mr. Swindler.

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an

unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) Mr. O'Keefe has provided a series of legal conclusions without the necessary evidence.

As I indicated in the Warning Letter, in determining whether adverse action has been taken against an employee the test is not whether the employee found the employer's action to he adverse, but "whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Newark Unified School District* (1991) PERB Decision No. 864.) Further, the adverse action must involve actual and not merely speculative harm. (*City and County of San Francisco (SEIU Local 790)* (2004) PERB Decision No. 1664-M.) Mr. O'Keefe has not demonstrated any actual harm to his employment status by the alleged actions taken by IBU and without that critical information, the charge does not state a violation.

Right to Appeal

Pursuant to PERB Regulations,[3] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By_____
Roger Smith
Labor Relations Specialist

Attachment

cc: Dmitri Iglitzin

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8387
Fax: (916) 327-6377

June 29, 2010

Derrick O'Keefe

Re: *Derrick C. O'Keefe v. Inlandboatmen's Union of the Pacific*
Unfair Practice Charge No. SF-CO-228-M
WARNING LETTER

Dear Mr. O'Keefe:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on May 25, 2010. Derrick C. O'Keefe (O'Keefe or Charging Party) alleges that the Inlandboatmen's Union of the Pacific (IBU, Union or Respondent) violated sections 3502, 3502.1 and 3506 of the Meyers-Milias-Brown Act (MMBA or Act)[1] and PERB Regulation 32603 by retaliating against him for filing earlier charges with PERB and for filing a grievance in December 2009 against his employer, Golden Gate Bridge Highway and Transportation District (District).[2]

Mr. O'Keefe is a member of the IBU and is employed as a deckhand by the District. Mr. O'Keefe previously filed PERB charges against both the Union and the District. His charge against the IBU was dismissed on December15, 2009. Mr. O'Keefe also allegedly assisted Willard Park, a fellow deckhand, with his PERB charge against the District, which was heard on August 26-27 and November 16, 2009.

On December 21, 2009, Mr. O'Keefe attempted to file a grievance against the District over the way a maintenance dockhand position had been filled, alleging that the District should have placed a current employee with the lowest seniority into the position rather than hiring a new employee. Mr. O'Keefe was apparently not himself placed in the maintenance deckhand position, nor would he have been placed in it if he had prevailed in his grievance. The District denied the grievance because it was not submitted through IBU and was not signed by IBU's Regional Director, Marina Secchitano.

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[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001, et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

[2] In addition the charge alleges violations of Regulations 99563.8(B) and 99563, which are not PERB Regulations and therefore, will not be addressed here. PERB has repeatedly held that it has no jurisdiction to enforce rights contained in other statutes such as the Education Code. (*Barstow Unified School District* (1997) PERB Decision No 1138b.)

On December 27, 2009, Mr. O'Keefe e-mailed Secchitano asking if the IBU was going to pursue his grievance.

Secchitano replied that contrary to the assertion being made by Mr. O'Keefe, IBU believed that the District had not violated any of the terms of the collective bargaining agreement in effect between the parties. Secchitano cited the Memorandum of Understanding (MOU), which stated "The District may assign a regular employee to the Maintenance Deckhand position but they are not obligated to do so."

On December 31, 2009, Secchitano sent Mr. O'Keefe a letter on the same subject, reiterating that she, in her capacity as Regional Director, was rejecting his proffered grievance on the basis that it did not state a valid contractual claim. In accordance with IBU procedures, Secchitano informed Mr. O'Keefe of his right to appeal her decision to the governing body of the San Francisco Region, stating:

> If you disagree, you can appeal to the Executive Committee which will meet on Tuesday, January 12, 2010, at 9:00 AM in the Union Office, 450 Harrison Street, San Francisco.

On January 10, 2010, Mr. O'Keefe sent an e-mail to the Regional Director stating in pertinent part:

> Once again Mrs. Regional Director, Are you going to file the grievance or not? If you choose not to file the grievance please explain why the Company is not obligated to adhere to the MOU? (emphasis added)

At the January 12, 2010 meeting of the Union's Executive Committee, the Committee voted not to pursue Mr. O'Keefe's grievance. In a letter from Secchitano to Mr. O'Keefe dated January 14, 2010 Mr. O'Keefe was informed "[i]n accordance with the IBU Constitution, you may appeal the decision to the Executive Council by March 15, 2010."

IBU in its response to the charge states that at the same meeting, the Executive Committee voted to send a letter reprimanding Mr. O'Keefe for the inappropriate language in his January 10, 2010 e-mail. Mr. O'Keefe was informed of this decision in a letter by IBU Vice Chair Robert Irminger which stated, in pertinent part:

> This is to inform you that language you used in recent communication to the Regional Director was inappropriate. Communication with Union Officials should be conducted in a civil and courteous manner. Please refrain from using such unprofessional language in the future.

The letter included a copy of the IBU's Non-Discrimination and Non-Retaliation Policy that was adopted in October 2009 for Mr. O'Keefe to review. The letter did not state that Mr.

O'Keefe had violated the policy. The letter concluded: "I would hope that there are no further incidences in the future."

Mr. O'Keefe sent an e-mail to Vice Chair Irminger asking for a clarification regarding which communication the letter referred to. IBU responded that it was "in reference to a January 10, 2010 e-mail you sent to the Regional Director addressing her as Mrs. Regional Director. As you know, the Regional Director is not married, so a simple Regional Director or Ms. Regional Director would suffice."

After Mr. O'Keefe found out what comment the warning was in connection to, he sent an e-mail to Irminger apologizing for improperly referring to the Regional Director as "Mrs. Regional Director." The Regional Director later sent Mr. O'Keefe a letter stating that his e-mail to Vice Chair Irminger was read at the February 9 executive board meeting and that it "was appreciated."

IBU argues that the reprimand did not impact any aspect of Mr. O'Keefe's employment with any employer, nor has it impacted Mr. O'Keefe's rights as a member of the IBU. Further IBU argues that the reprimand did not prevent or impair the Union from continuing to advocate on Mr. O'Keefe's behalf as the Union would any other member. IBU provides as an example, only two days after IBU's executive board reprimanded Mr. O'Keefe, Secchitano sent a letter to Z. Wayne Johnson, the District's Deputy General Manager, describing the inappropriate treatment and denial of medical treatment that Mr. O'Keefe had allegedly suffered at the hands of Ferry Division Manager Jim Swindler on January 12, 2010, and demanding an investigation.

Mr. O'Keefe in summary of his allegation against IBU states "I fear for my employment and any legal [p]rotection under the MOU or union bylaws. I am seeking help from the PERB to put an end to this constant harassment and the threat of termination."

Discussion

To demonstrate that an employer discriminated or retaliated against an employee in violation of Government Code section 3506 and PERB Regulation 32603(a), the charging party must show that: (1) the employee exercised rights under MMBA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider

> the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; *San Leandro*, *supra*, 55 Cal.App.3d 553); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; *San Leandro*, *supra*, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

While it is clear Mr. O'Keefe engaged in protected activity which IBU was aware of, he neither provides, nor alleges, the existence of evidence establishing either of the other required elements for a prima facie retaliation case.

Although the "adverse impact on an employee's employment" test was first established in cases alleging retaliation by employers, PERB uses the same test for allegations of retaliation by employee organizations. *(Civil Service Division, California State Employees Association (Eisenberg)* (2009) PERB Decision No. 2034-S). In determining whether adverse action has been taken against an employee the test is not whether the employee found the employer's action to he adverse, but "whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Newark Unified School District* (1991) PERB Decision No. 864.) Further, the adverse action must involve actual and not merely speculative harm. *City and County of San Francisco (SEIU Local 790)* (2004) PERB Decision No. 1664M.)

There is no evidence in this case establishing that any of the actions taken by the IBU had an adverse impact on Mr. O'Keefe's employment. The charge does not state that either the IBU's

ruling on the grievance he wished to file, nor the letter he received reprimanding him for his communication to the Regional Director, impacted his employment.

Although PERB has found that written reprimands by employers constitute adverse actions, the letter from IBU in this case is distinguishable. None of the factors that justify finding written employer reprimands to constitute adverse actions appear here: for example, there is no threat of specific future discipline in the letter nor is there an indication that it is being kept in a personnel file where it could form the basis for future discipline. *City of Long Beach* (2008) PERB Decision No. 1977-M.) There is no indication that Mr. O'Keefe's employer even knew about this reprimand before this charge was filed, nor that the District took any action against Mr. O'Keefe as a result of the Union's reprimand. Mr. O'Keefe does not provide any evidence in support of his allegation that he was threatened with expulsion from the IBU and financial penalty in retaliation for his protected activity, and therefore those allegations cannot provide the basis for a retaliation charge.

Thus, there is no evidence that the warning letter sent to Mr. O'Keefe about the inappropriate language in his e-mail to the Regional Director had an adverse impact on his employment. There were no further sanctions against Mr. O'Keefe besides the letter, therefore, Mr. O'Keefe's retaliation claim regarding the reprimand for improperly addressing the Regional Director does not include the necessary element of an adverse employment action and will therefore be dismissed.

Even if either the warning regarding inappropriate language and/or the denial of his grievance are considered adverse actions having an impact on his employment, Mr. O'Keefe has not established or alleged the necessary connection between the adverse actions and the protected activity he engaged in. The proximity in timing by itself is not enough. Although the timing of the employee organization's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary "nexus" between the adverse action and the protected conduct. *(Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employee organization's disparate treatment of the employee; (2) the employee organization's departure from established procedures and standards when dealing with the employee; (3) the employee organization's inconsistent or contradictory justifications for its actions; (4) the employee organization's failure to offer the employee justification at the time it took action or the offering of exaggerated vague, or ambiguous reasons; or (5) any other facts which might demonstrate the employer's unlawful motive. (*Novato, supra,* PERB Decision No. 210; *North Sacramento School District* (1982) PERB Decision No. 264); *California State Employees Association (Carrillo)* (1994) PERB Decision No. 1199-S.)

Mr. O'Keefe has not provided or alleged any evidence of disparate treatment, departure from established practice, or any other factor that would establish the nexus between his alleged protected activities and those actions that would be necessary in order for him to prevail in this proceeding.

For these reasons the charge, as presently written, does not state a prima facie case.[3] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before July 12, 2010,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Roger Smith
Labor Relations Specialist

RCS

[3] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[4] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)